DOCUMENT RESUME

ED 296 672 HE 021 575

AUTHOR Newman, James F.
TITLE Collective Bargaining in Higher Education. Politics, Law, and Economics of Higher Education.
PUB DATE Sep 85
NOTE 29p.; Ed.D synthesis paper, Nova University.
PUB TYPE Historical Materials (060) -- Viewpoints (120)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Collective Bargaining; *College Faculty; Court Litigation; Federal Legislation; Governance; Higher Education; *Political Influences; Teacher Administrator Relationship; *Teacher Employment; *Unions
IDENTIFIERS *National Labor Relations Board v Yeshiva Univ

ABSTRACT

The historical background of collective bargaining in higher education is considered, along with some implications for the future. The major purpose of collective bargaining is to lead to an employment contract. Public institutions do not come under the National Labor Relations Board since state actions establish them and they are subject to state authority. Some principals of labor law and contract law are identified, along with issues of institutional politics that affect collective bargaining and the employment contract. In addition to identifying selected federal legislation enacted since 1932 that serve as landmarks for postsecondary education employment, recent historical developments are covered, including the unionization of faculty and the Yeshiva University case. Among the major issues to be settled in the future include: faculty governance, types and duties of committees, selection and duties of administrators, content and access to personnel files, faculty reduction, overload, academic freedom, professional development, job security, and tenure or tenure denial. Additional future concerns include: training for both administrators and faculty in collective bargaining and more staff positions to accommodate collective bargaining. (SW)

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COLLECTIVE BARGAINING IN HIGHER EDUCATION

POLITICS, LAW, AND ECONOMICS OF HIGHER EDUCATION

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PHILADELPHIA CLUSTER

A SYNTHESIS PAPER PRESENTED TO NOVA UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF EDUCATION

NOVA UNIVERSITY

SEPTEMBER, 1985

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HISTORICAL BACKGROUND

Traditionally, labor law did not favor concerted activities by workers (such as strikes, picketing, and refusals to deal with certain employers) to gain higher wages and/or better working conditions. These concerted activities at various times were found to constitute criminal conspiracy, tortious conduct, and violations of antitrust law. The application of the criminal conspiracy doctrine to attempts by employees to organize unions aroused much public protest (Holley and Jennings, 1984: 70). Eventually public pressure in respect to the adverse treatment afforded labor forced Congress to intervene (Smith, Mann, and Roberts, 1984:493).

The federal Congress has enacted statutes which may be considered landmarks in their impact on postsecondary education (Blocker, Bender and Martorana, 1975:134). In 1932, Congress passed the Norris-LaGuardia Act (also called the Federal Anti-Injunction Act). Marking a change in philosophy in labor relations, the Act allowed employees "full freedom of association, self-organization and designation of representatives of their own choosing, negotiation of terms and conditions of employment" and "freedom from employer interference, restraint, or coercion." Further, it recognized, as a national policy, the employees' right to freedom from employer interference in their efforts of "self-organization and

other concerted efforts for the purpose of collective bargaining or other mutual aid and/or protection." The Act restricted the courts from issuing injunctions, temporary or permanent, in any case involving or growing out of a labor dispute. With no administrative agency to administer the Act, it was difficult to enforce, however (Holley and Jennings, 1984:73-74).

On July 5, 1935 President Franklin D.Roosevelt, who had been strongly backed by labor union members, signed into law the National Labor Relations Act, whose passage was facilitated by the success of the Norris-LaGuardia Act of 1932 and which corrected the inequality of bargaining power between employers and employees. It guaranteed workers' rights in organizing and bargaining that would eventually lead to similar rights to organize and bargain for public employees. The National Labor Relations Act, a federal statute known as the Wagner Act of 1935, is a comprehensive piece of legislature which regulates the relations between employers and employees. The rationale for the act was, in part, that unfair practices led to strikes and disputes which, in turn, obstructed the free flow of commerce (Chase and Ducat, 1979:492). It was an affirmative action by the government to support collective bargaining and unionization, since it was felt that this was in the national interest.

Since the rights provided in this act were not self-enforcing and guaranteeing these rights through the

courts would be time consuming, this act, one of the most significant in labor history, established the National Labor Relations Board (NLRB), an independent agency, which has two principle functions: preventing and remedying unfair labor practices by employers and labor organizations or their agents, and conducting secret ballot elections among employees in appropriate collective bargaining units to determine whether or not they desire to be represented by a labor organization or to revoke their union authority (Black, 1979:29). The Board, must first determine the appropriate bargaining unit - that is which group of employees makes up the union (Schantz, 1980:953).

The United States Supreme Court in 1937, decided five labor relations cases - the most publicized, NLRB v. Jones & Laughlin Steel Corp. (301 U.S. 1 (1937)) - and declared the Wagner Act constitutional (Holley and Jennings, 1984:75). Several provisions of the U.S. Constitution have been interpreted as applying to labor relations activities. The authority of the National Labor Relations Board (NLRB) is derived from the interstate commerce claus in the U.S. Constitution (Bender and Martorana, 1980:68). Article 1, Section 8, which authorizes Congress to regulate commerce, has been used to determine the constitutionality of several statutory enactments (Holley and Jennings, 1984:69). The ability of Congress to regulate interstate commerce has been

justified by the Supreme Court by its interpretation of the necessary and proper clause (Art. I, Clause 18) which gives Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ." The relations of American colleges and universities with the federal government is essentially predicated upon this Constitutional authority which states that neither states nor other entities within the states can establish barriers to free and open commerce. This commerce power also relates to collective bargaining of personnel in private institutions under the National Labor Relations Board and other federal acts which include the amendments to the National Labor Relations Act, namely the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959 (Bender and Martorana, 1980:74).

The Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. Secs 141 et seq., which increased the scope of the National Labor Relations Act, had as its prime purpose the regulation and restriction of the activities of unions, the protection of individuals, employees and employers against the power of unions and was an attempt to restore a balance of power in labor relations (Webb, 1983:8). As a result of the Taft-Hartley Act, the labor movement lost momentum yet did continue to grow. The Act, which identified and prohibited certain unfair union practices such as the closed shop, governs

collective bargaining at private institutions that come under the NLRB.

The Landrum-Griffin Act of 1959 established the conduct of union officers, and drastically curtailed recognition and organizational picketing. It also amended the Taft-Hartley Act and further restricted the scope of union activity. This act slowed down union membership growth (Webb, 1983:8). However, it will most likely continue to grow in the public sector. Watkins (1982:6) states that by 1982 the growth of academic collective bargaining reached a complete standstill at private institutions.

The First Amendment of the Constitution, which assures the rights of peaceful assembly and free speech, usually has been interpreted as allowing employees to form and join unions and has provided the justification for union picketing (to communicate information to possible union members and union supporters). The Fifth and Fourteenth Amendments contain due process provisions, and the Fourteenth Amendment provides equal protection under the law (Holley and Jennings, 1984:69).

The NLRB entered uncharted waters and claimed jurisdiction over private institutions when they accepted non-professional personnel at Cornell University in 1970 and then extended its jurisdiction to faculty members one year later in the C.W. Post Center of Long Island University (189 NLRB 904, 1971) (Bender and Martorana,

1980:62). Together the NLRA and the Taft-Hartley Acts form the legal foundation of union activity in the private sector (Reitz and Jewell, 1985:467).

Collective Bargaining

Collective bargaining is not only here to stay, but will most likely continue to grow, at least in the public sector, as faculty members are faced with increasing uncertainty relative to job security, and as they continue to desire more control over their employment situation. Collective bargaining, even though firmly entrenched in business and industry for over fifty years, has only within the past two decades begun to find acceptance on the campuses of our nation's colleges and universities (Webb, 1983:4-24). The National Labor Relations Act firmly established collective bargaining as a fact of American life. Collective bargaining, as contemplated by the National Labor Relations Act (NLRA), is a procedure looking toward the making of collective agreements between an employer and accredited representatives of employees concerning wages, hours, and other conditions of employment, and requires that parties deal with each other with open minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations may be stabilized and obstructions to the free flow of commerce prevented (Black, 1979:238-239).

Collective bargaining is a fairly recent phenomenon in higher education. Distinctly different legal bases exist for private institutions than for public institutions (Bender and Martorana, 1980:68). Public institutions do not come under the NLRB since state actions establish them and they are subject to state authority, whereas in 1970, the NLRB exerted jurisdiction over private colleges and universities. Collective bargaining promises to be a major focus of controversy in postsecondary education for the foreseeable future (Kaplin, 1980:251).

The major purpose of collective bargaining is to lead to an employment contract. Beal (1976:251) suggested that almost all contracts (agreements) have four major sections: (1) management rights and union security; (2) the wage and effort bargain; (3) individual security; and (4) administration.

Contract Law

A contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing (Black, 1979:291-292). Essential to free enterprise in our economic system is the protection of rights created by contracts. Law, in its generic sense, is a body of rules of action or conduct prescribed by a controlling authority and having binding legal force (Black, 1979:796). The law of contracts, therefore,

prescribes actions and conduct relating to contracts. Labor law is designed to control and govern the continuing process by which workers and management decide the terms and conditions of employment based almost entirely on laws passed in the past 50 years.

The goals of labor laws are four:

1. industrial peace;
2. collective bargaining;
3. self-organization; and
4. quick settlement of disputes (Schantz, 1980:951-953).

Labor relations law in the United States is derived from statutory law, judicial decisions and interpretations, and administrative decisions by agencies of the executive branch (Holley and Jennings, 1984:68).

Contracts, as written through the process of collective bargaining by unions and administrators, are at the base of the relationship between the institution and its personnel. Schantz (1980:170) concludes that people need commercial law so as to be able to plan and project secure in the knowledge that their business dealings and agreements with others will be legally binding and enforceable. Basic to contract law is the principle that the four elements of contracts are binding on both parties. These four elements are:

1. Mutual assent;
2. Consideration;

3. Capacity; and

4. Legality.

An institution cannot expect of an employee any condition or service which is not specified in the terms of the contract (Bender and Martorana, 1980:65). Custom and prevailing practice also play a part in institutional governance.

Politics

Educational institutions are political institutions, both internally and externally, and politics plays a part in collective bargaining. Blocker et al. (1975: 40) postulate that American postsecondary education, like the American political system, is controlled by brokers of political power who are prime movers among the political elites. Elites are individuals having power in their relationships with others in the process of decision making. Power relationships depend on the particular decisions being made and politics plays an important part in decision making in most organizations. The brokers of power use as their base one or more groups or institutions which give them leverage in the political structure for power. One of the elites in the power politics of higher education is the professional union and its membership. Some members are self-seeking, competitive, and unresponsive to change, but, on balance, those directing postsecondary education (and that includes unionized

faculty) tend to be public minded, desirous of consentual governance, and responsive to changing social needs and demands. Political interaction is the process of adjudicating conflicting values, demands, or positions; and in this competitive process, shaping policies and decisions relative to administrative control and resource allocation (Blocker, Bender and Martorana, 1975:V). Politics plays an important part in decision making in most organizations. The present postsecondary education system, like the American political system, is controlled by a group of political elites.

A number of issues arise in institutional politics including the distribution of economic benefits to personnel, the internal distribution of power as well as professional development opportunities which become the agenda for collective bargaining and the contract eventually negotiated between the faculty union and the institution. Colleges are political arenas, microcosms of a social political system itself (Blocker, Bender and Martorana, 1975:58).

RECENT HISTORY

Unionization of Faculty

Unions play an important role in more and more institutions of postsecondary education today. The organization of employees, both professional and nonprofessional, into unions is already well under way and

no doubt will continue to grow in the future, particularly in the public sector. The underlying cause of such growth is the need for individuals to use disciplined collective power in order to compete effectively with other groups to achieve individual and group goals which satisfy self-interest. Unions have and will become the principal vehicle for the protection of the individual and the group seeking to satisfy such self-interest (Blocker, Bender and Martorana, 1975:205).

While teachers' unions date back to the late nineteenth century, it was not until the 1960s that many teachers turned to collective bargaining to resolve issues in education. Since 1969, when City University of New York broke the ice, the major bargaining agents for higher education have made considerable inroads into previously uncharted territory (Webb, 1983:18).

One early attempt was in Norwalk, Connecticut in 1946 when the school board refused to recognize and negotiate with the teacher's union organization which then appealed to the Connecticut State Supreme Court. The Conncecticut Supreme Court ruled against the teachers saying that the teachers could not force the school board to negotiate with the union and that the school board could bargain collectively with the teachers over work conditions but that the school board alone had authority to make managerial decisions (Holley and Jennings, 1984: 455-456).

A major breakthrough in teacher unionization occurred in New York City in 1961 when, after negotiations and a strike, the board of education accepted collective bargaining and agreed to an election for choosing a bargaining agent. The American Federation of Teachers won an overwhelming victory. Increasingly, collective bargaining was accepted which resulted in professional associations. The NEA, an early group, concentrated on professionalism and public education whereas the AFT emphasized economic issues. The NEA eventually changed its tactics and practices to advocate collective bargaining and to accept the strike as a legitimate means of resolving impasses.

The success of these groups prompted college and university faculty members to begin collective bargaining activities. By 1982, 157,000 faculty members were covered by collective bargaining agreements on over 700 campuses, including some of the most prestigious in America. Most organizable units have been unionized in public institutions where state laws permit collective bargaining (Holley and Jennings, 1984:456). As professors became more powerful in dealing with the educational process, they set admissions and retention criteria, established standards for selection and promotion of faculty members, and established policies for the allocation of time and resources for instruction, research and other services (Blocker, Bender and Martorana, 1975:59). This would lead to problems at a later date.

The Yeshiva University Case

In December, 1976 the NLRB certified the Yeshiva University Faculty Association as the exclusive bargaining representative of all full-time faculty including departmental chairmen and assistant deans. The university refused to bargain with the union, however, claiming that the NLRB had improperly designated faculty members as a bargaining unit. On appeal of the NLRB's order, the U.S. Court of Appeals ruled in favor of the university. It stated:

> The record here discloses that in many instances the full-time faculty of the schools of Yeshiva without question effectively recommend the hiring, promotion, salary and tenure of the faculty of the University in a manner which can hardly be described as routine or clerical. They further perform managerial functions not only by their personnel decisions but by adopting the standards of admission, the curriculum, the grading system, and the graduation requirements of their school (Kaplin, 1980:14).

Kaplin (1980:15) further quotes the ruling in stating: "They are, in effect, substantially and pervasively operating the enterprise." This, of course, exempted them from coverage of the 1935 NLRA (Wagner Act) as amended by the Management Relations Act of 1947 (The Taft-Hartley Act).

In the Yeshiva case, the United States Supreme Court rejected the National Labor Relations Board's (NLRB) position regarding faculty representation rights under the National Labor Relations Act (NLRA) in 1980, and ruled

that faculty at Yeshiva University were managerial employees and thus had no statutory right to engage in collective bargaining under the National Labor Relations Act of 1935. The major consideration was whether the faculty exercised authority which could be considered managerial. The court noted that the faculty had absolute authority in academic matters, such as deciding what courses would be offered, when they would be scheduled, and to whom they should be taught. The faculty determined admission, retention and graduation requirements. The Supreme Court rejected the Board's argument that the faculty's authority simply constituted the routine exercise of professional skill and thus declared them to have managerial status (Feldacker, 1983:80-81). The justices focused on the academic decision-making authority of the faculty.

The NLRB tried without success to convince the Supreme Court that three rationales used since 1971 were sufficient to establish the legitimacy of faculty unions. These were that:

1. Faculty authority is collective;

2. Final authority for important decisions rests with the board of trustees; and

3. Faculty authority is exercised in its own interests rather than in the interests of the university.

In the majority opinion, however, the Supreme Court justices maintained that the first two arguments were flatly inconsistent with the National Labor Relations

Board's own precedents, and that the third did not appear clearly in any previous NLRB opinion. The Supreme Court justices chided the NLRB for relying on these arguments rather than on an examination of the facts of the Yeshiva case (Kuechle, 1982:271).

Implications of the Yeshiva Case

There are serious implications for both the NLRB and private institutions as a result of the Yeshiva case. However, the Supreme Court noted that its decision was not intended as a wedge to sweep all professional employees outside the Act. Yeshiva does not mean that the professional faculty at all schools will be barred automatically from collective bargaining. That will depend upon whether the faculty exercises the collective decision-making power that the faculty in Yeshiva exercised (Faldecker, 1983:81). Kuechle (1982:272) states that governance structures vary substantially from one institution to another; consequently no one case is likely to set a pattern for all of higher education and the various institutions that make up higher education.

The decision has brought about claims from numerous institutions that their faculty have managerial status. One case, the NLRB v Catholic Bishop of Chicago, considered the NLRB's jurisdiction of lay teachers in parochial schools. Both the Court of Appeals and the Supreme Court ruled against the NLRB (Kaplin, 1980:19).

Collective bargaining at private colleges and university campuses may be sharply curtailed as a result of this and other recent court rulings limiting the reach of the NLRB into the academic world. Court cases may slow the rapid growth of faculty bargaining and restrict the universe of institutions subject to federal law (Kaplin, 1980:24).

Thirty institutions have cases pending before the NLRB claiming that the faculty should not be covered under the NLRA and therefore have no bargaining rights (Holley and Jennings, 1984:457). The NLRB has proceeded on a case by case basis rather than upon a policy of systematic rule-making. This is contradictory to case law which is law established by the precedent of judicial decisions in cases previously heard (Blocker, Bender and Martorana, 1975:68). The NLRB bases their decisions on whether faculty formulate, determine and effectuate managerial decisions such as curriculum development, selection of administrators and promotion and tenure decisions; whether faculty act in the interest of the employer; whether faculty is held accountable for conforming with managerial policies; and what percentage of faculty time is spent in exercising authority (Holley and Jennings, 1984:457).

By 1982, five decisions were rendered by the NLRB. In three cases, faculty were considered managerial and in two they were considered employees under the NLRA, therefore, having rights to union representation. At the

University of Albuquerque, the union was decertified since all but eight faculty members in effect managed the University. At Ohio Northern University, the NLRB revoked certification of the union on the grounds of Yeshiva but the University continues to implement or to continue personnel policies and practices. New Haven University has reinforced and strengthened collegiality. Boston University, after a bitter battle and strike, has signed a contract. These decisions, after the Yeshiva case, have helped clarified the role of faculty and collective bargaining in higher education.

THE FUTURE

Changes are occurring within our society that are having an effect upon labor organizations as well as upon education. The impetus for change in educational institutions is more likely to derive from changes in the wider society than from forces within the institutions themselves. Among the changes are the changing characteristics of union members, economic adversities, a decline in labor's public image, and the slow rate of growth of union membership. Economic conditions have affected and will continue to affect the attitudes and objectives of employees and unions. Economic adversity will continue to have a direct impact on collective bargaining in higher education. These conditions also will influence the climate in which the bargaining must occur and the

bargaining power each is able to exercise. Unionization and strikes by professors traditionally have been regarded as being incompatible with their professional status. This attitude has changed substantially in recent times (Chruden and Sherman, 1984:345-363).

Efforts have been made by faculty union leaders, top level college and university administrators, and consultants to fashion guidelines, in cooperation with the general counsel of the NLRB, to deal with this matter. These guidelines would have to take into account the unique characteristics of professionals in higher education while recognizing that some faculties probably need protection under collective bargaining (Kuechle, 1982:274).

Such a set of guidelines was issued on April 10, 1981 by William Lubbers, general counsel of the NLRB. The principal features were:

1. In all Yeshiva-related cases, comprehensive factual records are to be compiled.

2. These records must address the managerial status of each faculty member and of the faculty as a whole.

3. The fact that some individual faculty members are managerial does not necessarily mean that the entire faculty is beyond NLRA protection.

4. The wrongful inclusion of some managerial employees in a collective bargaining unit does not necessarily give the college or university the right to withdraw recognition or to refuse to bargain.

5. If a union represents a majority of employees and is certified by the NLRB, the college or

> university has a continuing obligation to bargain with the union even though there has been a challenge to individuals or to the entire unit for Yeshiva-related reasons (Kuechle, 1982:274).

Criteria were also established for determining a faculty member's managerial status. Of course, there is no assurance that the courts will adopt the same standards.

The provisions of labor agreements in education are similar to those in other occupations in many ways; nonetheless, some provisions are unique to educators (Holley and Jennings, 1984:459). These provisions will continue to be issues in the future that can have serious repercussions in light of Yeshiva.

Many schools, particularly at the university level, have emphasized collegiality - an attitude that faculty should have input into administration decisions (for instance, those involving course content, graduation requirements, and promotion of faculty members) because they have professional expertise and concerns. Collegiality has been traditionally fostered through two mechanisms: (a) faculty senates and (b) faculty committees (Holley and Jennings, 1984:463). Yet this same collegiality led to the Supreme Court decision in Yeshiva. Are colleges and universities allowing collegiality and thus leading faculty unions into a Yeshiva trap? Holley and Jennings (1984:464) say that unions may need to virtually eliminate the use of collegiality if they are to be successful. The success of college and university

unions will largely depend on their ability to resolve the collegiality issue in a manner satisfactory to most members and traditional union principles.

Major Issues

Among the perennial major issues to be settled in the future are:

1. Faculty governance;
2. Types and duties of committees;
3. Selection and duties of administrators;
4. Content and access to personnel files;
5. Faculty reduction;
6. Overload;
7. Overload compensation;
8. Academic freedom;
9. Office space;
10. Professional development;
11. Job security;
12. Tenure or denial of same.
(Holley and Jennings, 1984:459).

Unions will affect significantly the ability of administrators to direct and control the performance of educators who are union members. Therefore, for administrators, it is essential to understand how unions operate and be skillful in their relations with them. Administrators typically have control over the management of the institution but relatively less over academic management. A major factor which weakened the position of

the administrator was the rapid development of collective bargaining and the unionization of professionals. Professional unions have not (and probably will not) confined themselves to economic issues; they have attempted to translate faculty participation in college governance into contractual agreements which transfer management responsibilites and prerogatives from administrative officers to faculty (Blocker, Bender and Martorana, 1975:59-67). Blocker et al. (1975:205-206) further state:

> As these professional unions feel their way toward a new equilibrium among power groups, they will attempt to preserve all existing professional prerogatives and to penetrate even further into managerial responsibilites.

It is exactly these actions, however, that lay the foundation for the elimination of unions in some institutions through the legal actions brought about as a result of Yeshiva.

IMPLICATIONS FOR THE FUTURE

The administration is the central feature of internal governance yet the faculty performs the central functions of the university and are generally in control of the academic program. Faculty-administration relations are sensitive, subtle and sometimes abrasive. The balance of power, or at least influence, shifts as institutional and academic concerns rise and fall. Perkins (1984:7) states that professors instinctively resist authority so

the modes and requirements of governance are contrary to their intellectual style. Governance is and will be a major concern for both administration and faculty,yet for faculty members there is the potential for danger, the danger of Yeshiva. Unions will have to consider the serious implications of Yeshiva when bargaining.

Other implications include:

1. More training for both administrators and faculty in collective bargaining;
2. More staff positions to accomodate collective bargaining;
3. Closer coordination between various administrative functions;
4. Careful review of personnel policies and procedures (Holley and Jennings, 1984:458).

The terms of many union contracts in education will tend to make professional roles more rigid and inhibit changes in curriculum, instruction and the delivery of other educational services (Blocker, Bender and Martorana, 1975:205). Kaplin (1980:96) says there will be a heavy involvement of legal counsel in future negotiations. This will entail extra expenditures that will take away from the educational process. Union representatives and management may have to spend more time at the bargaining table deliberating, arguing, persuading, haggling, trying to influence and, in general, trying to outwit each other (Webb, 1983:11). Faculty unionization and collective bargaining promise the perpetuation of governance by conflict in universities and colleges

(Stewart, 1976:5). Administrators at many colleges and universities have come to realize that challenges to Yeshiva cost too much in terms of time and money, therefore, have made accommodations with faculty unions and are working to implement policies that recognize these unions (Kuechle, 1982:279).

The Yeshiva decision will play a bigger role in collective bargaining in the future. Both sides must be aware of its implications. Collective bargaining could be curtailed as a result of this and other recent rulings which limit the reach of the NLRB into academia.

Higher education institutions are composed primarily of individuals pursuing educational objectives. The job they do can be done best if they are allowed to pursue these objectives in the absence of conflict. Yeshiva presents a unique and important opportunity for college and university leaders to assert a new leadership role - perhaps working with union representatives - to fashion legislation that accommodates the special needs of higher education. At the heart of future contracts must be the notion of higher education's public responsibility but individual rights must be guaranteed as well. The quality of scholarship can only be enhanced by the freedom of individual intellectual inquiry often within the supportive and open environment of the institution (Stewart, 1976:22). This supportive and open environment can be doomed if the collective bargaining process is not

a sincere and honest one. The future structure of higher education in the United States, i.e., the relationships between faculty and administration, depends upon the process of collective bargaining.

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